BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AUVA M. LANDENBERGER	)	
Claimant	)	
	)	
VS.	)	
	)	
LIBERTY, INC.	)	
Respondent	)	Docket No. 258,350
	)	
AND	)	
	)	
KEMPER INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent appealed Administrative Law Judge Bryce D. Benedict's Award dated March 8, 2002. The Board heard oral argument on September 4, 2002.

APPEARANCES

George H. Pearson of Topeka, Kansas, appeared for the claimant. Brian J. Fowler of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) awarded claimant a 53.7 percent work disability based upon a 46.3 percent wage loss and a 61.1 percent task loss. Respondent requested review and argues claimant should be limited to her functional impairment. Respondent argues the functional impairment should be the average of the two ratings provided in this case. In the alternative, respondent argues the work disability should be reduced to 32.1 percent based upon a 26.8 percent task loss and a 37.4 percent wage loss. Conversely, claimant argues the ALJ's Award should be affirmed in all respects.

The sole issue raised on review is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board concludes the ALJ's Award should be affirmed.

It is undisputed that as a result of her repetitive work duties for respondent the claimant developed bilateral hand pain with pain into her arms, shoulders and neck. Claimant's hand pain continued to worsen and she initially sought treatment in June 2000. Finally on July 26, 2000, claimant decided to take a few days off work to see if her hand pain would improve. When claimant returned to work on August 8, 2000, the plant manager told her there were no jobs available that she could perform because of her hand problems and she was laid off.

On March 27, 2001, Dr. Bradley W. Storm performed endoscopic bilateral carpal tunnel releases on claimant's hands. Dr. Storm last saw claimant on June 14, 2001. The doctor rated claimant's bilateral carpal tunnel syndrome in both wrists at 2 percent to the body as a whole based on the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). The doctor agreed claimant was not at maximum medical improvement the last time he saw her on June 14, 2001, but claimant was released without restrictions. The doctor based his rating upon that last examination and the assumption claimant's condition would further improve with time.

Claimant testified Dr. Storm told her that if she continued to perform repetitive production work she would require additional open carpal tunnel surgery. Dr. Storm did not recall that conversation but agreed such conversations commonly occur with patients.

Dr. Lynn D. Ketchum examined claimant on June 26, 2001, at the request of her attorney. Nerve conduction studies were performed which revealed that surgery had improved claimant's motor latencies but the study still revealed mild motor latencies in the right and left median nerves. Dr. Ketchum noted a moderately severe condition before surgery had improved to a mild condition after surgery.

Dr. Ketchum rated the claimant with a 10 percent permanent partial impairment of each upper extremity based on Table 16, page 57, of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). The 10 percent right and left upper extremity converts to a 12 percent whole person. Because the doctor concluded claimant still had mild carpal tunnel syndrome he recommended that she not perform repetitive gripping more than 50 percent of the time.

Dick Santner, a vocational rehabilitation consultant, met with claimant and prepared a task list based upon claimant's prior 15-year work history. The resultant task list contained 36 separate tasks. Dr. Ketchum reviewed this task list and opined that as a result of her work-related injury claimant could no longer perform 22 of the 36 tasks.

Conversely, Dr. Storm opined that because claimant did not have any restrictions she could still perform all of the tasks listed in Mr. Santner's task list.

Initially, the respondent argues that because claimant was released without restrictions she should be limited to her functional impairment. Adoption of this argument would ignore claimant's continued complaints of pain as well as the fact that when Dr. Storm released claimant he agreed she was not at maximum medical improvement. Moreover, the uncontradicted evidence was that a nerve conduction study performed after surgery revealed claimant still had mild bilateral carpal tunnel syndrome. The Board agrees with the ALJ's determination that Dr. Ketchum's opinion imposing permanent restrictions is more persuasive. Because Dr. Ketchum's restrictions eliminate claimant's ability to perform some of the work tasks she performed during the 15-year period preceding the accident she is entitled to a work disability. For the same reasons, the Board affirms the ALJ's finding that claimant has a 12 percent permanent partial functional disability to the whole body.

Respondent next argues the task loss should be averaged between Dr. Storm's 0 percent and Dr. Ketchum's 61.1 percent. Again, Dr. Storm's opinion is less persuasive because he based his lack of restrictions upon the assumption claimant's condition would improve. Moreover, although the doctor could not recall the conversation, claimant testified she was advised by the doctor to not return to repetitive production work. It is inconsistent to make such a recommendation but not impose restrictions against such repetitive work activities. The more persuasive opinion was provided by Dr. Ketchum. Accordingly, the Board affirms the ALJ's finding claimant has a 46.3 percent task loss.

Lastly, respondent argues the wage loss should be calculated based upon a $6 per hour wage because that is what claimant was earning at the time of the regular hearing. Although claimant had found employment working at a bar for $6 per hour, she only worked between 30 and 35 hours a week and that was the only job she could find. There was no evidence claimant could work a 40-hour work week at the bar. The ALJ noted that claimant's job at the bar, with the inclusion of tips, would result in an average weekly wage of $205, but, the ALJ determined claimant had not made a good faith effort to obtain employment. The ALJ then concluded there was no evidence in the record that claimant could earn more than the minimum wage for a 40-hour work week and that resulted in an average weekly wage of $206. The Board adopts the ALJ's analysis that based upon the evidence in this case the claimant has a 46.3 percent wage loss.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated March 8, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Brian J. Fowler, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation